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Joseph P. Bauer

*Notre Dame Law School*, [jbauer@nd.edu](mailto:jbauer@nd.edu)

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# Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?

JOSEPH P. BAUER\*

## INTRODUCTION

A casual glance at the daily newspapers would suggest that athletes and sports teams spend almost as much time squaring off in the courts as they do on the playing fields. Professional football players complain that the teams for which they play and the National Football League have conspired to impose illegal restraints on their ability to offer their services to other teams. A baseball team went to court to challenge the decision by the now-deposed Commissioner of Baseball to shift it from one division to another. College players, coaches, and universities all contend that various rules imposed by the National Collegiate Athletic Association are unlawful. The list seems endless.

Principal among the theories asserted by plaintiffs in many of these cases is that these practices violate the antitrust laws. Yet, challenges in the sports world which assert claims arising under the antitrust laws are nothing new; indeed, they extend back over seven decades.<sup>1</sup> Ever since, courts have sought to adjust the needs of athletes, teams, and sports leagues to the frequently conflicting goals of competition promoted by the antitrust laws. This Article will review many of these past disputes, as well as provide an overview for analysis of the new disputes, which inevitably will arise in the future.

## I. PROFESSIONAL SPORTS<sup>2</sup>

Numerous facets of the various professional sports benefit either from complete or partial immunity from potential antitrust actions.

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\* Professor of Law, Notre Dame Law School. J.D. 1969, Harvard Law School; A.B. 1965, University of Pennsylvania. This Article is an advance version of a chapter in Volume X of the treatise *Federal Antitrust Law* by Earl W. Kintner and Joseph P. Bauer, published by Anderson Publishing Co. All rights reserved.

1. See, e.g., *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

2. "It is certainly no secret to these parties, to this Court, or to the average eight-year-old sports fan that antitrust issues exist in professional sports." National

The existence and extent of this immunity depends both on the particular sport in question and the activity being challenged.

Professional baseball enjoys the anomalous position of having a complete exemption from antitrust challenge. While other professional sports remain subject to antitrust scrutiny, their conduct is often held to less rigorous standards than conventional industries. In addition, various aspects of the business of sports have been accorded protection—either complete or partial—from potential antitrust actions. These activities include agreements for the broadcasting of sporting events, certain mergers of sports leagues, restraints on the ability of players freely to choose the teams for which they will play, and restrictions on geographic moves by sports franchises.

### A. Baseball<sup>3</sup>

Organized baseball has enjoyed a complete exemption from the application of the antitrust laws since 1922. In *Federal Baseball Club*

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Hockey League v. National Hockey League Players Ass'n, 789 F. Supp. 288, 295 (D. Minn. 1992). See generally LAW OF PROFESSIONAL AND AMATEUR SPORTS (Gary A. Uberstine ed., 1988); JOHN C. WEISTART & CYM L. LOWELL, THE LAW OF SPORTS §§ 5.01-.02 (1979 & Supp. 1985); Daniel E. Lazaroff, *Antitrust Analysis and Sports Leagues: Re-examining the Threshold Questions*, 20 ARIZ. ST. L.J. 953 (1988); Jerome F. Leavell & Howard L. Millard, *Trade Regulation and Professional Sports*, 26 MERCER L. REV. 603 (1975); John P. Morris, *Keeping the Game Fair and Square—Antitrust Laws and Professional Sports in America*, 59 AUSTL. L.J. 476 (1985); Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 945 (1988); Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729 (1987); Kenneth L. Shropshire, *Thoughts on International Professional Sports Leagues and the Application of United States Antitrust Laws*, 67 DENV. U. L. REV. 193 (1990); Paul J. Tagliabue, *Antitrust Developments in Sports and Entertainment*, 56 ANTITRUST L.J. 341 (1987); Steven G. Biddle, Note, *Less Restrictive Alternatives for Achieving and Maintaining Competitive Balance in Professional Sports*, 30 ARIZ. L. REV. 889 (1988); Lori J. Brown, Note, *The Battle: From the Playing Field to the Courtroom—United States Football League v. National Football League*, 18 U. TOL. L. REV. 871 (1987); James F. Foley, Comment, *Antitrust and Professional Sport: Does Anyone Play by the Rules of the Game?*, 22 CATH. U. L. REV. 403 (1973); John J. Scura, Comment, *The Time Has Come: Ending the Antitrust Non-Enforcement Policy in Professional Sports*, 2 SETON HALL J. SPORT L. 151 (1992); Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418 (1967).

3. See generally articles cited *infra* note 15; Robert G. Berger, *After the Strikes: A Reexamination of Professional Baseball's Exemption from the Antitrust Laws*, 45 U. PITT. L. REV. 209 (1983); Thomas M. Boswell & Richard B. McKeown, *Baseball—From Trial by Law to Trial by Auction*, 4 J. CONTEMP. L. 171 (1978); H. Ward Classen, *Three Strikes and You're Out: An Investigation of Professional Baseball's Antitrust Exemption*, 21 AKRON L. REV. 369 (1988); John Eckler, *Baseball—Sport or Commerce?*, 17 U. CHI. L. REV. 56 (1949); John P. Morris, *In the Wake of the Flood*, 38 LAW & CONTEMP. PROBS. 85 (1972); John W. Neville,

of *Baltimore, Inc. v. National League of Professional Baseball Clubs*,<sup>4</sup> challenges were made against the contractual relationships between the major league teams and their players, which subsequently came to be known as the "reserve system." Rejecting the plaintiff's claims, the United States Supreme Court held that the business of baseball principally involved intrastate activities, to which the antitrust laws did not apply, since their reach extends only to interstate commerce.<sup>5</sup>

Although this crabbed view of the general scope of the Commerce Clause has long since been eroded, and therefore the predicate for the *Federal Baseball Club* decision has disappeared, the Supreme Court has on two subsequent occasions reaffirmed that baseball remains exempt from potential antitrust liability.<sup>6</sup> *Flood v. Kuhn*,<sup>7</sup> the more recent of these two cases, offered two principal rationales for this result—Congress' "positive inaction" and the doctrine of *stare decisis*.<sup>8</sup> The Court noted that Congress has been well aware of the unique position enjoyed by baseball compared to other organized

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*Baseball and the Antitrust Laws*, 16 FORDHAM L. REVIEW 208 (1947); C. Paul Rogers, III, *Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws*, 14 HOUS. L. REV. 611 (1977); Paul W. Shapiro, *Monopsony Means Never Having to Say You're Sorry—A Look at Baseball's Minor Leagues*, 4 J. CONTEMP. L. 191 (1978); Frank B. Lewis, Note, *Antitrust Laws and Professional Baseball*, 19 N.Y.U. INTRAMURAL L. REV. 235 (1964); Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576 (1953); Allie J. Prescott, III, Note, 2 MEM. ST. U.L. REV. 299 (1972); Recent Decision, *Antitrust Laws—The Applicability of Federal and State Antitrust Laws to the Sport of Baseball—Flood v. Kuhn*, 443 F.2d 264 (2d Cir. 1971), 1971 U. TOL. L. REV. 594.

4. 259 U.S. 200 (1922). The plaintiff, a member club of the defunct Federal League, asserted that the National and American Leagues and their member clubs had conspired to monopolize the business of baseball. *Id.* at 207.

5. *Id.* The Court stated:

The business is giving exhibitions of base ball, which are purely state affairs. It is true that . . . competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines . . . is not enough to change the character of the business. . . . [T]he transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words.

*Id.* at 208-09.

6. *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

7. 407 U.S. 258 (1972). The plaintiff, a major league baseball player, challenged baseball's reserve system—a set of uniform contract provisions that bound a player in perpetuity to the club which held his contract (or the club to which this contract was assigned), and that prevented him from negotiating with any other club. Flood alleged that the reserve system constituted a conspiracy among the League members, whereby all other clubs agreed to boycott his services. *Id.* at 260-61.

8. *Id.* at 283.

sports, as well as the change in general case law under the Commerce Clause.<sup>9</sup> Nonetheless, although some legislative attempts have been made to overrule the *Federal Baseball Club* result, all have proven unsuccessful.<sup>10</sup> The *Flood* Court concluded that this history indicated congressional acquiescence in—if not satisfaction with—the particular rule.<sup>11</sup> As a result, although baseball's anomalous position arguably is both "inconsistent" and "illogical,"<sup>12</sup> this exemption, which was originally the product of judicial creation, is now "fully entitled to the benefit of *stare decisis*."<sup>13</sup>

Since the *Flood* decision, baseball's antitrust exemption has been eroded on the periphery. For example, one court has held that the exemption only applies to the actual enterprise of baseball and not to contracts for the radio-broadcasting of games.<sup>14</sup> Furthermore, much of the flexibility that baseball teams enjoyed in their dealings with their players has been eroded through collective bargaining agreements.<sup>15</sup> However, the core rule—that the "business of baseball"

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9. *Id.*

10. "Since *Toolson* more than 50 bills have been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball. A few of these passed one house or the other." *Id.* at 281 & n. 17 (footnote omitted).

11. "The Court . . . has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity." *Id.* at 283.

12. "If there is any inconsistency or illogic in all this, it is an inconsistency or illogic of long standing that is to be remedied by the Congress and not by this Court." *Id.* at 284.

13. *Id.* at 282. See generally Richard B. Blackwell, Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism*, 12 WM. & MARY L. REV. 859 (1971); John J. McQuaide, Note, *Curt Flood at Bat Against Baseball's "Reserve Clause"*, 8 SAN DIEGO L. REV. 92 (1971); Barton J. Meritore, Comment, *Baseball's Antitrust Exemption: The Limits of Stare Decisis*, 12 B.C. INDUS. & COM. L. REV. 737 (1971); Joseph P. Paonessa, Case Comment, 48 NOTRE DAME LAW. 460 (1972).

14. *Henderson Broadcasting Corp. v. Houston Sports Ass'n*, 541 F. Supp. 263 (S.D. Tex. 1982). Cf. *Amateur Softball Ass'n of Am. v. United States*, 467 F.2d 312 (10th Cir. 1972) (absolute exemption does not extend to amateur baseball); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 365 F. Supp. 235 (N.D. Cal. 1972) (contract between baseball team and concessionaire is subject to antitrust laws), *rev'd on other grounds*, 512 F.2d 1264 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1975); *Liberty Broadcasting Sys. v. National League Baseball Club*, 1952 Trade Cas. (CCH) ¶ 67,278 (N.D. Ill. 1952) (no discussion of potential antitrust immunity to challenge of baseball club's restrictions of broadcasts).

15. See *infra* notes 71-73 and accompanying text. See generally Robert A. McCormick, *Baseball's Third Strike: The Triumph of Collective Bargaining in Professional Baseball*, 35 VAND. L. REV. 1131 (1982); David Steinberg, *Application of the Antitrust and Labor Exemptions to Collective Bargaining of the Reserve System of Professional Baseball*, 28 WAYNE L. REV. 1301 (1982); Scott A. Dann, Note, *The Effect of Collective Bargaining on the Baseball Antitrust Exemption*, 12 FORDHAM URB. L.J. 807 (1984); Stephen L. Willis, Comment, *A Critical Perspective of Baseball's Collusion Decisions*, 1 SETON HALL J. SPORT L. 109 (1991).

is immune from antitrust challenge<sup>16</sup>—remains as a curious vestige of early twentieth century Commerce Clause jurisprudence.

### B. Other sports—general

Unlike organized baseball, the activities of all other professional sports are subject to scrutiny under the antitrust laws. The Supreme Court has expressly held that the antitrust laws apply to professional football<sup>17</sup> and professional boxing,<sup>18</sup> and the Court has further indicated in dictum that other sports are also subject to antitrust liability.<sup>19</sup> Numerous lower court decisions have in fact applied the antitrust

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16. It is clear that the exemption extends beyond the legality of baseball's reserve system, which was the narrow issue involved in the three Supreme Court cases. For example, in *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 540-41 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978), a baseball club owner asserted that the decision of the Commissioner of Baseball, disallowing the trade of three of its players on the ground that the transactions were contrary to the best interests of organized baseball, was an unlawful conspiracy in violation of the Sherman Act. Applying the exemption to this conduct, the Seventh Circuit held that "the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws." *Id.* at 541 (footnote omitted). *See also* *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970) (declining to reject application of exemption to complaint by former baseball umpires that their discharge was result of conspiracy), *cert. denied*, 400 U.S. 1001 (1971); *Portland Baseball Club, Inc. v. Kuhn*, 368 F. Supp. 1004, 1007 (D. Ore. 1971) (action by former minor league team franchisee against organized baseball exempt from antitrust laws), *aff'd per curiam*, 491 F.2d 1101, 1103 (9th Cir. 1974). *Cf.* *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981) (contract between major league baseball players union and bubble gum manufacturer for exclusive licensing of right to sell baseball cards not unlawful under §§ 1 and 2 of Sherman Act; decision on merits, no reference to possible exemption). *But see* *Martin v. National League Baseball Club*, 174 F.2d 917 (2d Cir. 1949) (post-1922 involvement of organized baseball with radio and television broadcasting may undermine holding of *Federal Baseball*); *Gardella v. Chandler*, 172 F.2d 403 (2d Cir. 1949) (same as *Martin*).

17. *Radovich v. National Football League*, 352 U.S. 445 (1957). *See generally* John A. Gray & Stephen J. K. Walters, *Is the NFL an Illegal Monopoly?*, 66 U. DET. L. REV. 5 (1988).

18. *United States v. International Boxing Club, Inc.*, 348 U.S. 236 (1955).

19. "Other professional sports operating interstate—football, boxing, basketball, and presumably, hockey and golf—are not so exempt." *Flood v. Kuhn*, 407 U.S. 258, 282-83 (1972) (footnotes omitted). *See also* *Haywood v. National Basketball Ass'n*, 401 U.S. 1204, 1205 (Douglas, Circuit Justice 1971) ("Basketball, however, does not enjoy exemption from the antitrust laws"). *Cf. Resolution Would Limit or Rescind Professional Sports' Antitrust Exemption*, Antitrust & Trade Reg. Rep. (BNA) No. 1528, at 182 (Aug. 8, 1991) (Senate resolution to limit or eliminate exemption for professional football, baseball, basketball and hockey). *See generally* Jon S. Hainline, *Matchpoint: Agents, Antitrust and Tennis*, 64 U. DET. L. REV. 481 (1987); George A. Metanis, Thomas J. Cryan & David W. Johnson, *A Critical Look at Professional Tennis Under Antitrust Law*, 4 ENT. & SPORTS L.J. 57 (1987); Mark S. Miller, *The National Hockey League's Faceoff with Antitrust: McCourt v. California Sports, Inc.*, 42 OHIO ST. L.J. 603 (1981).

laws to these other sports.<sup>20</sup> Therefore, the possibility of different analysis under the antitrust laws requires examination of the particular conduct involved; this treatment will be considered in the balance of this Article.

### 1. Mergers

The creation of a new sports league has the potential of giving rise to various competitive pressures with the preexisting league, including bidding for players' services, loss of attendance at games, and diminution of telecasting or licensing revenues. In the past, in a number of instances, the response to the presence of rival sports leagues has been a merger between the existing league and the new entrant.

Absent some exemption, these consolidations would be tested by the same standard applicable to industry generally—Section 7 of the Clayton Act.<sup>21</sup> As noted above, organized baseball enjoys a general, common-law exemption, and, since 1966, professional football has operated under a statutory umbrella, which immunizes "a joint agreement by which the member clubs of two or more professional football leagues . . . combine their operations in expanded single league . . . if such agreement increases rather than decreases the number of professional football clubs so operating."<sup>22</sup> This legislation authorized the merger of the American Football League (AFL) with the older, larger National Football League (NFL).<sup>23</sup>

Other professional sports do not enjoy a similar exemption.<sup>24</sup> Although several other sports leagues have lobbied in Congress for similar legislation, to date these have proven unsuccessful.

Subsequent to the passage of the 1966 amendment for professional football, rival football leagues have been started on two occasions; in both instances, the new league folded after a few seasons. These

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20. See, e.g., *Peto v. Madison Square Garden Corp.*, 384 F.2d 682 (2d Cir. 1967) (hockey); *Deesen v. Professional Golfers' Ass'n of Am.*, 358 F.2d 165 (9th Cir.) (golf), *cert. denied*, 385 U.S. 846 (1966).

21. 15 U.S.C. § 18 (1988).

22. 15 U.S.C. § 1291 (1988).

23. That merger had been preceded by a lawsuit brought by the AFL against the NFL, in which the AFL unsuccessfully challenged the older league's position under monopolization and attempt to monopolize theories. *American Football League v. National Football League*, 323 F.2d 124 (4th Cir. 1963).

24. See *Robertson v. National Basketball Ass'n*, 1970 Trade Cas. (CCH) ¶ 73,282 (S.D.N.Y. 1970) (proposed merger of two basketball leagues enjoined; professional basketball does not have same antitrust status as baseball). See also *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 879-80 (S.D.N.Y. 1975) (refusing to dissolve injunction), *settlement of class action approved*, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

attempts then spawned litigation, in which this statutory exemption played a spill-over role.

The first post-1966 rival football league—the World Football League (WFL)—began operation in 1974. After it was disbanded in 1975, the WFL team that had been located in Memphis, Tennessee, sought an NFL franchise. When its application was refused, it brought an action against the NFL under Sections 1 and 2 of the Sherman Act.<sup>25</sup> The 1966 amendment admittedly had the effect of conferring market power on the defendants;<sup>26</sup> the plaintiff argued that the statute also required that this market power be shared.<sup>27</sup> Rejecting this assertion, the United States Court of Appeals for the Third Circuit concluded that the amendment was not intended “to increase competition in professional football, but to permit geographic enlargement of the NFL’s market power.”<sup>28</sup> Although there might have been a diminution of certain kinds of competition<sup>29</sup> as a result of the 1966 amendment and the subsequent NFL-AFL merger, the asserted harm to a rejected franchise applicant was neither caused by the merger nor protected by the statute.<sup>30</sup>

The more recent rival to the NFL—the United States Football League (USFL)—began operations in 1983 and abandoned play in 1985. Even before its demise, the USFL brought Section 1 and 2 claims against its larger competitor. Instead of challenging the NFL’s

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25. *Mid-South Grizzlies v. National Football League*, 720 F.2d 772 (3d Cir. 1983).

26. “That congressional decision conferred on the NFL the market power which it holds in the market for professional football.” *Id.* at 784.

27. “[I]t is the Grizzlies’ contention that the statute which authorized NFL acquisition of monopoly power in the professional football market required not only that the league members refrain from abusing that power against potential competitors, but that it take affirmative steps to share its market power with others.” *Id.*

28. *Id.* at 785. The court explained:

Since the 1966 statute is not directed at preservation of competition in the market for professional football, and cannot be construed as conferring any economic benefit on the class to which the Grizzlies belong, we conclude that it does not oblige the NFL to permit entry by any particular applicant to the NFL shared market power.

*Id.*

29. The plaintiff asserted that the merger resulted in potential anti-competitive effects in the area of “intra-league, non-athletic competition.” *Id.* at 786. These effects included rivalry for players and coaching personnel, for ticket buyers, for local broadcast revenue, and for sale of concession items such as food and beverages. *Id.*

30. As the court noted:

Congress by legislation in 1961 and 1966 authorized the NFL acquisition of the market power which it holds, and the Grizzlies cannot challenge that acquisition. The only action they complain of is their exclusion from the shared monopoly, but they have failed to show that their admission would be contra-competitive in any way.

*Id.* at 788.



structure directly, the USFL attacked the NFL's contracts with all three television networks as barriers to entry and also challenged various asserted forms of predatory conduct. A jury entered a verdict for the plaintiff on some of the monopolization claims, but it rejected the USFL's attacks on the television contracts; the jury awarded the USFL only nominal damages, and the trial court refused to grant injunctive relief.<sup>31</sup> In the course of affirming this judgment,<sup>32</sup> the United States Court of Appeals for the Second Circuit agreed with the Third Circuit's observation: The statutory provisions authorizing football league mergers effectively insulate professional football from attacks on its league structure.<sup>33</sup>

## 2. Broadcasting

In the 1950s and early 1960s, the United States Department of Justice brought two actions against the NFL, challenging restraints it had imposed in connection with contracts with television networks for the broadcasting of its football games.<sup>34</sup> The earlier action<sup>35</sup> attacked bylaws the NFL had adopted, which imposed restrictions on radio and television broadcasts of games into the "home territory"<sup>36</sup> of another league member.<sup>37</sup> In a 1953 decision, the federal district court, recognizing that certain restraints on competition were necessary to equalize both the on-field strength of the teams and the financial well-being of the entire enterprise, initially concluded that these bylaws would be tested under the rule of reason.<sup>38</sup> The court then held that while certain League restraints on broadcasting were lawful,<sup>39</sup> others were unreasonable and therefore prohibited by the

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31. *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988).

32. *United States Football League v. National Football League*, 842 F.2d 1335 (2d Cir. 1988).

33. "Congress has authorized the NFL's single-league structure and its joint economic operations . . . . Because of the explicit congressional authorization in 1966 for the NFL-AFL merger and single-league operation, the USFL does not attack the league structure directly." *Id.* at 1379-80.

34. *United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961); *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).

35. *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).

36. "Home territory" was defined in the NFL bylaws as the area within 75 miles of the boundaries of a league city (with certain exceptions). *Id.* at 321.

37. The bylaws prohibited, *inter alia*, radio broadcasts into a team's home territory of other teams' games while that team was playing a home game, and television broadcasts into a team's home territory of other teams' games, irrespective of whether a home game was being played or not. *Id.*

38. *Id.* at 324.

39. *Id.* at 326. The court approved the by-law blacking out the television broadcast of a competing game into a team's home territory while it played a home game. *Id.*

Sherman Act.<sup>40</sup> As a result, the NFL was forced to modify its restrictions on game broadcasts.

Prior to 1961, the individual NFL teams had entered into separate television contracts with broadcasters. In that year, the NFL entered into a master contract with the CBS television network. The NFL then returned to the district court that had entered the final decree in the earlier action, seeking a determination whether this contract was lawful.<sup>41</sup> That court held that since the contract would have allowed CBS exclusive discretion to determine whether to broadcast any particular game in any particular market, the contract was inconsistent with the earlier judgment.<sup>42</sup>

In response to that decision, Congress agreed to confer a statutory exemption not only on broadcasts of professional football games, but also on those of professional baseball, basketball, and hockey;<sup>43</sup> the amendment—the Sports Broadcasting Act—permits teams to pool their individual rights to telecasts and to sell these pooled rights as a package.<sup>44</sup> The amendment also declares that member clubs may “black out” telecasts of games within their “home territory” when those clubs play a home game.<sup>45</sup> The effect of this legislation was to overrule the 1961 district court decision, while codifying the 1953

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40. *Id.* at 327. The court struck down all prohibitions on radio broadcasts and on television broadcasts into a team's home territory while it was itself not playing a home game. *Id.*

41. *United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961).

42. *Id.* at 447. The court also noted that by use of a master contract, “the member clubs of the League have eliminated competition among themselves in the sale of television rights to their games.” *Id.*

43. Pub. L. No. 87-331, 75 Stat. 732 (1961) (codified at 15 U.S.C. §§ 1291-95 (1988)).

44. The amendment provides:

The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

15 U.S.C. § 1291 (1988).

45. The exemption does “not apply to any joint agreement . . . which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home.” 15 U.S.C. § 1292 (1988). *Cf. Hertel v. City of Pontiac*, 470 F. Supp. 603 (E.D. Mich. 1979) (rule did not deprive residents of “black-out” metropolitan area of equal protection within meaning of Fourteenth Amendment).

holding regarding television blackouts.<sup>46</sup> Ironically, although the amendment was passed to overturn a judgment affecting professional football, the exemption placed certain times-of-the-week restrictions on football telecasts, which are not imposed on the other three sports.<sup>47</sup>

Subsequent case law indicates that this amendment affords substantial protection to sports leagues in the four covered sports with respect to their sale of telecasting rights. Not only has the statute been read expansively to include broad grants of rights; it has also been used successfully as a shield against charges of monopolization or attempts to monopolize resulting from the exercise of the rights conferred.<sup>48</sup>

There are several examples of the broad interpretation of the statutory exemption. Thus, it has been held applicable to telecasts

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46. See generally Cori Jan Ching, Note, *A Critique of the National Football League's "Blackout" Exemption From the Antitrust Laws*, 8 J. LEGIS. 104 (1981).

47. To prevent professional football telecasts from affecting high school or college football attendance, the exemption, as amended in 1966, does not apply to a television package which would permit

the telecasting of all or a substantial part of any professional football game on any Friday after six o'clock postmeridian or on any Saturday during the period beginning on the second Friday in September and ending on the second Saturday in December in any year from any telecasting station located within seventy-five miles of the game site of any intercollegiate or interscholastic football contest scheduled to be played on such a date if—

(1) such intercollegiate football contest is between institutions of higher learning both of which confer degrees upon students following completion of sufficient credit hours to equal a four-year course, or

(2) in the case of an interscholastic football contest, such contest is between secondary schools, both of which are accredited or certified under the laws of the State or States in which they are situated and offer courses through the twelfth grade of the standard school curriculum, or the equivalent, and

(3) such intercollegiate or interscholastic football contest and such game site were announced through publication in a newspaper of general circulation prior to August 1 of such year as being regularly scheduled for such day and place.

15 U.S.C. § 1293 (1988).

48. See, e.g., *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1396 (9th Cir.) ("[t]o effectuate this right [to engage in collective negotiation for telecasting of games], the League must be allowed to have some control over the placement of teams to ensure NFL football is popular in a diverse group of markets"), cert. denied, 469 U.S. 990 (1984). But see *Henderson Broadcasting Corp. v. Houston Sports Ass'n*, 541 F. Supp. 263, 269-70 (S.D. Tex. 1982) (Act inapplicable to contract licensing right to radio broadcasts of baseball games). See generally Phillip A. Garubo, *The Last Legal Monopoly: The NFL and its Television Contracts*, 4 ENT. & SPORTS L.J. 357 (1987); Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463 (1990); Scott L. Hoffman, Note, *Pooling of Local Broadcasting Income in the American Baseball League—Antitrust and Constitutional Issues*, 32 SYRACUSE L. REV. 841 (1981).

of league championship games as well as to regular games.<sup>49</sup> It has been interpreted to confer protection against television signals *received* within the "home territory" of a team playing at home, and not merely to telecasts of competing games by broadcasters who are *located* within that territory.<sup>50</sup> In addition, the exemption has been held applicable to contracts with more than one network.<sup>51</sup>

As noted above,<sup>52</sup> two major challenges to the monopoly position of the NFL have been raised by ultimately unsuccessful rival leagues. Although the WFL's action did not challenge the broadcasting ar-

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49. *Blaich v. National Football League*, 212 F. Supp. 319 (S.D.N.Y. 1962).

50. *WTWV, Inc. v. National Football League*, 678 F.2d 142 (11th Cir. 1982).

51. *United States Football League v. National Football League*, 842 F.2d 1335, 1353-55 (2d Cir. 1988). *See also* *Colorado High Sch. Activities Ass'n v. National Football League*, 711 F.2d 943 (10th Cir. 1983) (requirement in 15 U.S.C. § 1293(3) that high school seeking protection against simultaneous telecasting of professional football game must specify "game site," requires identification of actual field or stadium and is not satisfied by specification of metropolitan area in which game would be played).

One case, however, limited the reach of the Act in a dispute between the National Basketball Association (NBA) and one of its teams, the Chicago Bulls, involving television broadcasting rights. The NBA had entered into broadcasting contracts with two networks for a number of its games. The NBA also allowed individual teams to enter into their own contracts for other games with broadcasters; however, in an effort to prevent competition with League-licensed broadcasts, the NBA placed a limit of 20 games per season on individual team licenses with so-called "superstations." The Bulls had entered into a contract with such a "superstation," providing for the broadcast of 25 of their games per season; when the NBA sought to prevent this as violative of its League restrictions, the Bulls challenged the restraint under § 1 of the Sherman Act.

In *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 754 F. Supp. 1336, 1349-52 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir.), *cert. denied*, 121 L. Ed. 2d 334 (1992), the district court held that this League provision was not shielded from antitrust attack by the Act. The exemption extends only to "any joint agreement . . . by which any league . . . transfers all or any part of the right of [the] league's member clubs in the sponsored telecasting of . . . games." *Id.* at 1350 (quoting 15 U.S.C. § 1291) (1988) (emphasis added). The court held that the Act does not apply either to agreements by individual teams or to agreements by which the league seeks to *prevent* the transfer of those rights. *Id.* at 1352. On appeal, the Seventh Circuit affirmed the determination that the Act did not exempt the League's restrictions. 961 F.2d at 670. It concluded that the statutory language, authorizing the transfer of "all or any part of" the rights to games, included the authority to grant those rights to a particular network and then to withhold the exercise of that right by individual teams to other broadcasters, and thus the NBA might have been able to achieve this restriction by other means, especially if it could make a showing of its appropriate purpose and the overall benefit to consumers. *Id.* However, here the NBA's licenses with the other networks had not in fact sought to control all potential broadcasts. Since the Act was special interest legislation, it had to be read in limited fashion. *Id.* *Cf.* *Nishimura v. Dolan*, 599 F. Supp. 484 (E.D. N.Y. 1984) (cable television company lacked standing to challenge exclusive licensing contracts between various professional sports teams and competing cable company).

52. *See supra* notes 25-33 and accompanying text.

rangements,<sup>53</sup> the plaintiffs' principal claims in the USFL's action were predicated on the NFL's use of television contracts as barriers to entry and as a means of enhancing the NFL's market power.<sup>54</sup> However, the court of appeals rejected that argument, instead finding that "the Sports Broadcasting Act . . . exempt[s] from antitrust scrutiny a league's pooled-rights contracts with networks unless they constitute illegal monopolization or an unreasonable restraint of trade so far as competing leagues are concerned."<sup>55</sup>

This amendment and subsequent case law interpreting it have resulted in the enhancement of the market power of the existing professional sports leagues, while making entry by new leagues more difficult and less likely. Although the congressional history indicates antipathy to this entrenchment of the existing competitors,<sup>56</sup> Congress probably was also aware that this indeed would be one effect of this legislation.<sup>57</sup> Future application of this exemption will probably recognize this inconsistency.

### 3. Restraints on Players<sup>58</sup>

Numerous commentators have pointed to a unique aspect of the nature of competition appropriate to team sports: While the individ-

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53. *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 776 (3d Cir. 1983) ("[T]he Grizzlies make no complaint about the operation of the NFL arrangements for joint sale of television rights.")

54. *United States Football League v. National Football League*, 842 F.2d 1335, 1341-42 (2d Cir. 1988) ("[T]he USFL candidly admits that 'at the heart of this case' are its claims that the NFL, by contracting with the three major networks and by acting coercively toward them, prevented the USFL from acquiring a network television contract indispensable to its survival.")

55. *Id.* at 1358. The court also approved the trial court's requirement that it had to "show that the intent *and* effect of the NFL's television contracts with the major networks were exclusionary (rather than simply intent *or* effect) in order to prove a Section 2 claim." *Id.* (emphasis in original).

56. "The [House] committee does not intend that an exemption from the antitrust laws should be made available to a league or its members where the intent or effect of a joint agreement is to exclude a competing league or its members from the sale of any of their television rights." H.R. REP. NO. 1178, 87th Cong., 1st Sess. 4 (1961), *quoted in* *United States Football League v. National Football League*, 842 F.2d 1335, 1354 (2d Cir. 1988).

57. *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 784 (3d Cir. 1983) ("Congress could not have been unaware that the necessary effect of the television revenue sharing scheme which it approved for the NFL would be that all members of that league would be strengthened . . . to the potential disadvantage of new entrants.")

58. *See generally* Panel Presentation: *Developments in Sports and the Law and the Interplay of Antitrust and Labor Law*, 125 F.R.D. 293 (1988); articles cited *infra* note 73; John R. Allison, *Professional Sports and the Antitrust Laws: Status of the Reserve System*, 25 BAYLOR L. REV. 1 (1973); Robert C. Berry & William B. Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls*

ual teams—and their corporate entities—can be competitors in a number of respects, some measure of cooperation is essential for success of the entire enterprise.<sup>59</sup> Some of these measures are obvious. The teams must agree on the rules of the game, uniforms and

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and Strikes, 31 CASE W. RES. L. REV. 685 (1981); Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers' Labor Market Restraints in Sports and Non-sports Markets*, 1989 UTAH L. REV. 617; Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971); Leslie M. Lava, *The Battle of the Superstars: Player Restraints in Professional Team Sports*, 32 U. FLA. L. REV. 669 (1980); Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339; Stephen R. McAllister, *The Nonstatutory Labor Exemption and Player Restraints in Professional Sports: The Promised Land or a Return to Bondage?*, 4 ENT. & SPORTS L.J. 283 (1987); Robert A. McCormick, *Labor Relations in Professional Sports—Lessons in Collective Bargaining*, 14 EMPLOYEE REL. L.J. 501 (1988); Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19 (1986); Barry S. Roberts and Brian A. Powers, *Defining the Relationship Between Antitrust Law and Labor Law: Professional Sports and the Current Legal Battleground*, 19 WM. & MARY L. REV. 395 (1978); Gary R. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 U. PITT. L. REV. 337 (1986); John C. Weistart, *Judicial Review of Labor Agreements: Lessons From the Sports Industry*, 44 LAW & CONTEMP. PROBS. 109 (1981); Phillip R. Bryce, Note, *The Sherman Act and Professional Team Sports: The NFL Rozelle Rule Invalid Under the Rule of Reason: Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), 9 CONN. L. REV. 336 (1977); Keith J. Burr, Comment, *Player Control Mechanisms in Professional Team Sports*, 34 U. PITT. L. REV. 645 (1973); D. Albert Daspin, Note, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 IND. L.J. 95 (1986); Douglas A. Econn, Note, *Servitude In Professional Sport—McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979), 2 WHITTIER L. REV. 559 (1990); Georgann H. Eglinsk, Note, *Antitrust—Professional Football—The Rozelle Rule as an Unreasonable Restraint of Trade*, 26 KAN. L. REV. 121 (1977); Bernard B. Kornmehl, Comment, *National Football League Restrictions on Competitive Bidding for Players' Services*, 24 BUFF. L. REV. 613 (1975); Paul L. Nelson, Note, *Professional Sports and the Non-statutory Labor Exemption to Federal Antitrust Law: McCourt v. California Sports, Inc.*, 11 U. TOL. L. REV. 633 (1980); Daniel C. Nester, Comment, *Labor Exemption to Antitrust Scrutiny in Professional Sports*, 15 S.M.U. L.J. 123 (1990); Note, *The NFL Draft and the Antitrust Laws—The Player Draft of the National Football League Held to Violate the Federal Antitrust Laws*, Smith v. Pro-Football, 41 ALB. L. REV. 154 (1977); Donald Novick, Note, *The Legality of the Rozelle Rule and Related Practices in the National Football League*, 4 FORDHAM URB. L.J. 581 (1976); Keith A. Prettyman, Note, *The True Story of What Happens When the Big Kids Say, "It's my football, and you'll either play by my rules or you won't play at all,"* 55 NEB. L. REV. 335 (1976); Steven M. Strauss, Comment, *Sport in Court: The Legality of Professional Football's System of Reserve and Compensation*, 28 U.C.L.A. L. REV. 252 (1980); John T. Whiting, Recent Decision, *Illegal Procedure—The Rozelle Rule Violates the Sherman Antitrust Act*, 59 MARQ. L. REV. 632 (1976).

59. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX* 332 (1978) ("Agreements to refuse to deal are essential to the effectiveness and sometimes to the existence of many wholly beneficial economic activities. All league sports . . . rest entirely upon the right to boycott.").

equipment, the dates and locations of each contest, and so on. Other areas for cooperation are only slightly less clear. For example, if only certain teams had access to the best players, so that the other teams were perpetually consigned to second-rank status on the playing field, fan interest in the entire league would eventually diminish, and all teams, and indeed the league itself, would be adversely impacted.<sup>60</sup> It has therefore been recognized that some limitations on uninhibited competition are necessary both to enhance competition in the long run and for the success of the overall enterprise.

One potential implication of this need for cooperation—and indeed the shared interest of the league and its member teams in advancing their common welfare—is that they might be viewed as a “single entity,” incapable of entering into a “conspiracy” in violation of Section 1 of the Sherman Act. Although there is support for this view both in the cases<sup>61</sup> and in law journal commentary,<sup>62</sup> the predominant position is that the teams are separate and distinct entities from the league of which they are members.<sup>63</sup> While the

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60. See, e.g., *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1253 (2d Cir.) (“the economic success of each franchise is dependent on the quality of sports competition throughout the league and the economic strength and stability of other league members”), *cert. denied*, 459 U.S. 1074 (1982); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 178-79 (D.C. Cir. 1978) (“[n]o NFL team, in short, is interested in driving another team out of business, whether in the counting-house or on the football field, for if the League fails, no one team can survive.”).

61. See, e.g., *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966, 969-70 (C.D. Cal. 1974) (teams are “all members of a single unit competing as such with other similar professional leagues”). See also *National Football League v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (“[t]he NFL owners are joint venturers who produce a product, professional football”) (Rehnquist, C.J., dissenting from denial of certiorari).

62. See, e.g., Myron C. Grauer, *The Use and Misuse of the Term “Consumer Welfare”: Once More to the Mat on the Issue of Single Entity Status for Sports Leagues under Section 1 of the Sherman Act*, 64 TUL. L. REV. 71 (1989); Myron C. Grauer, *Recognition of the National Football League as a Single Entity under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983); Gary R. Roberts, *The Antitrust Status of Sports Leagues Revisited*, 64 TUL. L. REV. 117 (1989); Gary R. Roberts, *The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View*, 60 TUL. L. REV. 562 (1986); Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intra League Rivalry*, 32 UCLA L. REV. 219 (1984); Terrance Ahern, Note, *The NFL's Final Victory Over Smith v. Pro Football, Inc.: Single Entity—Interleague Economic Analysis*, 27 CLEV. ST. L. REV. 541 (1978); James L. Brock, Jr., Comment, *A Substantive Test for Sherman Act Plurality: Applications for Professional Sports Leagues*, 52 U. CHI. L. REV. 999 (1985); see also Donald G. Kempf, Jr., *The Misapplication of Antitrust Law to Professional Sports Leagues*, 32 DEPAUL L. REV. 625 (1983).

63. See, e.g., *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1387-90 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1256-58 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); *McNeil v. National Football League*, 1992-1

different interests and needs of sports leagues might support arguments for the application of different antitrust standards, the "single entity" theory should not confer effective antitrust immunity.<sup>64</sup> Instead, a proper analysis of the significance of these differences requires consideration of the particular restraints and of their effects on competition.

Nowhere are these limitations on competition more prevalent than with respect to agreements between teams and their players. Two types of restraints have occasioned the greatest amount of litigation—agreements among teams allocating initial rights to bargain with players, usually known as "player drafts," and subsequent limitations on the right of players freely to move from one team to another.

The cases challenging these limitations on player freedom have generally reached various conclusions. Since these restraints appear on their face similar to concerted refusals to deal in other commercial settings, which have often been struck down under the per se approach,<sup>65</sup> on occasion the per se rule has been applied here as well.<sup>66</sup>

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Trade Cas. (CCH) ¶ 69,841, at 67,978-80 (D. Minn. 1992). See also *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 672-73 (7th Cir.) (NBA has some attributes of joint venture, and some of single entity; determination is complicated and fact-laden, and will not be undertaken on appeal absent significant deliberation; characterization by trial court is entitled to substantial deference), *cert. denied*, 121 L. Ed. 2d 334 (1992).

64. As the court recognized in *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1387-88 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984), accepting this defense would effectively immunize football—and presumably all other professional sports—from almost all antitrust challenges. See also *Mackey v. National Football League*, 543 F.2d 606, 616-18 (8th Cir. 1976) (restraints on competition within market for player services fall within Sherman Act), *cert. dismissed*, 434 U.S. 801 (1977). See generally 8 PHILLIP E. AREEDA, *ANTITRUST LAW* ¶ 1478d (1986); Maxwell M. Blecher & Howard F. Daniels, *Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act*, 4 WHITTIER L. REV. 217 (1982); Lee Goldman, *Sports, Antitrust, and the Single-Entity Theory*, 63 TUL. L. REV. 751 (1989); Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory*, 67 IND. L.J. 25 (1991); Daniel E. Lazaroff, *Antitrust Analysis and Sports Leagues: Re-examining the Threshold Questions*, 20 ARIZ. ST. L.J. 953 (1988); Daniel E. Lazaroff, *The Antitrust Implications of Franchise Restrictions in Professional Sports*, 53 FORDHAM L. REV. 157 (1984).

65. See, e.g., *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). See generally 2 EARL W. KINTNER, *FEDERAL ANTITRUST LAW* §§ 10.27-.38 (1980). Most of the cases challenging these player restraints were decided prior to the Supreme Court's decision in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). There, a former member of a purchasing cooperative challenged its expulsion from the organization. In holding that the rule of reason was the appropriate standard for evaluating this conduct, the Court recognized the procompetitive effects of certain cooperative undertakings by competitors. *Id.* at 295. It concluded that the expulsion would have been unlawful only if "the cooperative possesses market power or unique access to a business element necessary for effective competition." *Id.* at 298.

*Northwest Wholesale* affords additional support to professional sports teams in



However, because of the unique needs of professional sports, and because these agreements normally are not intended to exclude competitors,<sup>67</sup> more frequently it is the rule of reason which has been held to be the appropriate standard for evaluating them.<sup>68</sup> Finally,

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their attempts to rely on the rule of reason for evaluating their cooperative activities. See, e.g., *United States Football League v. National Football League*, 842 F.2d 1335, 1372 (2d Cir. 1988); *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 754 F. Supp. 1336, 1357-58 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir.) *cert. denied*, 121 L.Ed. 2d 334 (1992); *Weight-Rite Golf Corp. v. United States Golf Ass'n*, 1990-2 Trade Cas. (CCH) ¶ 69,181, at 64,467-68 (M.D. Fla. 1990); *Eureka Urethane, Inc. v. PBA, Inc.*, 746 F. Supp. 915, 931-32 (E.D. Mo. 1990), *aff'd*, 935 F.2d 990 (8th Cir. 1991); *Martin v. American Kennel Club, Inc.*, 697 F. Supp. 997, 1000-01 (N.D. Ill. 1988). See also *Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 73 (2d Cir. 1988).

66. See *Boris v. United States Football League*, 1984-1 Trade Cas. (CCH) ¶ 66,012 (C.D. Cal. 1984) (rule prohibiting member teams from selecting player unless his college eligibility had expired or until at least five years after he entered college, was per se illegal group boycott); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977) (rule prohibiting person under age 20 from playing with any member team in professional hockey league probably per se unlawful group boycott); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 890-96 (S.D.N.Y. 1975) (per se rule appropriate for basketball league's use of player draft, reserve clause and uniform player contracts), *settlement of class action approved*, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977); *Denver Rockets v. All-Pro-Management, Inc.*, 325 F. Supp. 1049, 1058, 1062-66 (C.D. Cal. 1971) (applying per se rule to basketball league's rule prohibiting player from negotiating with NBA teams until four years after his high school class graduation), *injunction reinstated sub nom.* *Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (Douglas, J., in chambers, 1971), *noted in* Jeffrey Garland, *Antitrust Law: Procedural Safeguard Requirements in Concerted Refusals to Deal: An Application to Professional Sports—Denver Rockets v. All-Pro-Management, Inc.* (C.D. Cal. 1971), 10 SAN DIEGO L. REV. 413 (1973). See also *Fishman v. Estate of Wirtz*, 807 F.2d 520, 541 (7th Cir. 1986) (applying per se rule to agreement to refuse lease arrangements to bidder for professional basketball franchise).

67. The Court in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* explained that per se condemnation is reserved for "joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'" 472 U.S. 284, 294 (1985) (emphasis added). The player restraints involve potential "concerted refusals to deal" with persons supplying services to the teams, rather than refusals to deal with competitors.

68. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1177-82 (D.C. Cir. 1978) (NFL player draft); *Mackey v. National Football League*, 543 F.2d 606, 618-20 (8th Cir. 1976) (NFL restrictions on team changes by players), *cert. dismissed*, 434 U.S. 801 (1977); *McNeil v. National Football League*, 1992-1 Trade Cas. CCH ¶ 69,841, at 67,992-93 (D. Minn. 1992) (contemplated wage scale for football players). See also *Kapp v. National Football League*, 390 F. Supp. 73, 79-82 (N.D. Cal. 1974) ("in this particular field of sports league activities the purposes of the antitrust laws can be just as well served (if not better served) by the basic antitrust reasonableness test as by the absolute per se test sometimes applied by the courts in other fields"), *aff'd in part and vacated in part*, 586 F.2d 644 (9th Cir. 1978), *cert.*

because less restrictive alternatives to these limitations often exist, and because, regardless of the defendants' motives, limitations nonetheless have adverse effects on competition,<sup>69</sup> they have frequently been struck down as unlawful.<sup>70</sup>

Finally, and perhaps most important, it should be noted that in the past decade, these restraints have become the subject of collective bargaining agreements in virtually all professional sports. As a result, team owners have surrendered at the bargaining table some of the rights they have won in the courts.<sup>71</sup> On the other hand, because of

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*denied*, 441 U.S. 907 (1979).

Perhaps relying on the aphorism that "the best defense is a good offense," and responding to the numerous challenges to the NFL's player restraints, the League initiated an action against the players' association, asserting that the agreement to share information on player compensation with agents for the players constituted unlawful price fixing. In *Five Smiths, Inc. v. National Football League Players Ass'n*, 788 F. Supp. 1042, 1055 (D. Minn. 1992), the court dismissed the complaint, finding the conduct lawful under both a per se rule and rule of reason approach. Under the latter, the court held that the challenged conduct was merely a step towards equalizing the bargaining ability that players lost because of exclusive rights assigned to teams through the draft system. *Id.* The court also concluded that this type of information exchange was procompetitive by enhancing salary negotiations, since it gave data to the players which the team owners already possessed. *Id.*

69. A principal result of both types of restraints is the reduction, or even the elimination, of the players' options regarding the teams with which they can bargain, which in turn drives down salaries.

70. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183-89 (D.C. Cir. 1978) (NFL player draft); *Mackey v. National Football League*, 543 F.2d 606, 620-22 (8th Cir. 1976) (NFL restrictions on team changes by players), *cert. dismissed*, 434 U.S. 801 (1977); *Kapp v. National Football League*, 390 F. Supp. 73, 81-83 (N.D. Cal. 1974) (challenging both NFL player draft and restrictions on team changes by players), *aff'd in part and vacated in part*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). See also *Radovich v. National Football League*, 352 U.S. 445, 453-54 (1957) (claim by football player-coach that teams conspired to refuse to hire him because he played for rival league stated antitrust cause of action); *Nassau Sports v. Hampson*, 355 F. Supp. 733, 736 (D. Minn. 1972) (refusing to enjoin hockey player from performing contract with team in rival league, since reserve clause in earlier contract may violate § 1); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 503-13 (E.D. Pa. 1972) (although doubt existed whether established hockey league's use of reserve clause violated § 1, its use clearly justified grant of preliminary injunctive relief, as an element of § 2 violation). But see *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197 (6th Cir. 1979) ("[a]ssuming without deciding that reserve systems such a [sic] those here are subject to Section 1 of the Sherman Act and could be violative of it . . ."). See generally Note, *Antitrust—Restraint of Trade—Group Boycott—NFL College Draft*, 15 DUQ. L. REV. 747 (1977).

71. Thus, although baseball enjoys a complete exemption from the antitrust laws, collective bargaining has won for baseball players most of the same rights to become "free agents" and to move from one team to another as those enjoyed by players in other professional sports.

the labor exemption,<sup>72</sup> the result of embodying some of these restraints in collective bargaining agreements has been to insulate them from subsequent challenges under the antitrust laws.<sup>73</sup>

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72. See generally 9 EARL W. KINTNER & JOSEPH P. BAUER, *FEDERAL ANTI-TRUST LAW* §§ 72.1-72.8 (1989).

73. One of the more extreme illustrations of the insulation of these disputes from antitrust challenge because of the labor exemption is *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 111 S. Ct. 711 (1991). The NFL Players Association had agreed to certain limitations on the rights of players to sign with other teams. After the collective bargaining agreement incorporating these restrictions expired, and after attempts to arrive at a new agreement embodying different restraints failed, the Association brought an action challenging these limitations under the antitrust laws. *Id.* at 1295. Dismissing these claims, the Eighth Circuit held that (1) the labor exemption can be relied upon equally by employers and employees; (2) the exemption continues to apply to terms contained in the collective bargaining agreement even after its expiration; and (3) the exemption still continues after an impasse has led to the breakdown of labor negotiations, as long as there is a possibility that proceedings might be commenced before the National Labor Relations Board, or until final resolution (including appeal) of NLRB proceedings. *Id.* at 1303-04. Finally, after a majority of NFL players voted to end collective bargaining, and the NFL Players Association decided to abandon all collective bargaining rights, the district court held that the labor exemption was no longer available; the court rejected the defendants' argument that actual decertification by the NLRB was required for loss of the exemption. *McNeil v. National Football League*, 764 F. Supp. 1351, 1355-57 (D. Minn. 1991).

A subsequent district court rejected *Powell's* extended continuing application of the nonstatutory labor exemption. *Brown v. Pro Football, Inc.*, 782 F. Supp. 125 (D.D.C. 1991). In *Brown*, players on the NFL's "developmental squads" challenged uniform salary provisions in their contracts. *Id.* at 127. The court concluded that the plaintiffs were properly a part of the bargaining unit represented by the NFL Players Association, since they were potential professional football players. *Id.* at 129. However, the court held that the better rule was that the exemption ceased upon expiration of the collective bargaining agreement; it further concluded that, in any event, the exemption should cease when the parties reached an impasse. *Id.* at 130-34. See also *Wood v. National Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987) (collective bargaining agreement between basketball league and players' association acceding to salary limitations and recognizing college draft was absolute bar to individual player's antitrust claim); *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197-1203 (6th Cir. 1979) (terms regarding reserve system—limiting teams with which professional hockey player may negotiate—were product of good faith, arm's length bargaining; their incorporation in collective bargaining agreement conferred immunity under nonstatutory labor exemption); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 963-67 (D.N.J. 1987) (although exemption is not lost at moment of expiration of collective bargaining agreement, it "survives only as long as the employer continues to impose that restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement"); *Zimmerman v. National Football League*, 632 F. Supp. 398, 403-08 (D.D.C. 1986) (limitation on choices of professional football player resulting from union-management agreement on "supplemental draft" immunized by nonstatutory exemption). Cf. *Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978) (district court's approval of settlement in class action by football players, providing damages and permitting future disputes

#### 4. Restrictions on Franchise Locations

In all professional sports, league rules or bylaws typically contemplate the assignment of each team to a location at which it plays

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to be resolved through collective bargaining, was not abuse of discretion); *National Hockey League v. National Hockey League Players Ass'n*, 789 F. Supp. 288 (D. Minn. 1992) (court lacked subject matter jurisdiction over action by league against players' bargaining representative, seeking declaratory judgment that league's rules requiring "equalization payments" to player's former team, by team signing free agent, did not violate antitrust laws). *But see Mackey v. National Football League*, 543 F.2d 606, 611-16 (8th Cir. 1976) (nonstatutory exemption unavailable when asserted agreement on player restraints was not "product of bona fide arm's length bargaining"), *cert. dismissed*, 434 U.S. 801 (1977); *Brown v. Pro Football, Inc.*, 782 F. Supp. 125 (D.D.C. 1991) (in event of impasse, nonstatutory exemption ends at expiration of contract; refusing to follow *Powell*); *Kapp v. National Football League*, 390 F. Supp. 73, 83-86 (N.D. Cal. 1974) (exemption inapplicable to restraints imposed on player prior to effective date of collective bargaining agreement), *aff'd in part and vacated in part*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 881-90 (S.D.N.Y. 1975) (labor exemption did not preclude players' antitrust action challenging reserve clause, player draft and proposed merger between two basketball leagues, since these were not mandatory subjects of collective bargaining), *approving settlement in class action*, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 496-500 (E.D. Pa. 1972) (exemption not available when use of reserve clause not only preceded formation of player organization, but has subsequently been resisted by players); *Boston Prof. Hockey Ass'n v. Cheevers*, 348 F. Supp. 261, 265-68 (D. Mass. 1972) (contracts containing reserve clauses, binding hockey player to one team, not shielded by labor exemption; clauses antedated collective bargaining negotiations), *remanded on other grounds*, 472 F.2d 127 (1st Cir. 1972). *See generally* articles cited *supra* note 58; Phillip J. Closius, *Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry*, 24 B.C. L. REV. 341 (1983); Addison E. Dewey, *Professional Athletes - Affluent Elitists or Victims of the Reserve System? An Emerging Paradox - Courts Protect Such Athletes From Antitrust Violations But Collective Bargaining Has Resulted in Antitrust Immunity for Leagues and Club Owners*, 8 OHIO N.U. L. REV. 453 (1981); Ethan Lock, *Powell v. National Football League: The Eighth Circuit Sacks the National Football League Players Association*, 67 DENV. U. L. REV. 135 (1990); Edward Newman, *A Player's View of the NFL Reserve System*, 4 ENT. & SPORTS L.J. 129 (1987); Neil K. Roman, *Illegal Procedure: The National Football League Players Union's Improper Use of Antitrust Litigation for Purposes of Collective Bargaining*, 67 DENV. U. L. REV. 111 (1990); George Stephanopoulos, *Plan B's Inevitable Demise: The Consequence of Powell v. National Football League*, 8 U. MIAMI ENT. & SPORTS L. REV. 121 (1991); David S. Underhill, *The National Football League Draft Eligibility Rule, the Labor Exemption, and Antitrust Law: It is Time to Put Amateurism Back into College Athletics*, 3 COOLEY L. REV. 567 (1985); Richard E. Bartolo, Note, *NFL Free Agency Restrictions Under Antitrust Attack*, 1991 DUKE L.J. 503; Bradley R. Cahoon, Comment, *Powell v. National Football League: Modified Impasse Standard Determines Scope of Labor Exemption*, 1990 UTAH L. REV. 348 (1990); Scott J. Foraker, Note, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157 (1985); Michael S. Hobel, Note, *Application of the Labor Exemption After the Expiration of*

its home games. These rules also provide that a team may not move its home site without the permission of the other league members or of the league itself. Some agreement on location is obviously necessary to facilitate scheduling of games, arrangements for broadcasts and the like. It is further asserted that franchise movement restrictions are necessary to protect fan interest and loyalty, to insure that no team is located in a market that is not capable of supporting a healthy franchise, to insure that the home attendance of other league members is not eroded by multiple franchises in the same area, and to protect the interests and investments of local governments in stadia and other facilities.<sup>74</sup>

The lawfulness of these restraints was extensively considered in *Los Angeles Memorial Coliseum Commission v. National Football League*.<sup>75</sup> The NFL had adopted bylaws that required the approval of three-quarters of the League's owners before any League member could relocate into the home territory of another League member. After the team owners voted to refuse permission to one of the League members that sought to move its franchise, the team brought an action—joined by the stadium to which the move would have been made—challenging the legality of these bylaws.<sup>76</sup> A jury returned a verdict for the plaintiffs.<sup>77</sup>

On appeal to the United States Court of Appeals for the Ninth Circuit, the court—although noting that agreements to divide markets are normally presumed illegal<sup>78</sup>—initially concluded that “the unique structure of the NFL precludes application of the per se rule . . . . Instead, we must examine [the NFL's Rule] to determine whether it reasonably serves the legitimate collective concerns of the owners or instead permits them to reap excess profits at the expense of the consuming public.”<sup>79</sup> After undertaking this analysis, the court then

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*Collective Bargaining Agreements in Professional Sports*, 57 N.Y.U. L. REV. 164 (1982); Comment, *Nearly a Century in Reserve: Organized Baseball, Collective Bargaining and the Antitrust Exemption Enter the 80s*, 8 PEPP. L. REV. 313 (1981); Note, *Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874 (1991); Note, 15 NEW ENG. L. REV. 765 (1980).

74. See *Football Commissioner Urges Congress to Give Club Owners Limited Exemption*, 43 Antitrust & Trade Reg. Rep. (BNA) 340 (Aug. 19, 1982). See generally James Quirk, *An Economic Analysis of Team Movements in Professional Sports*, 38 LAW & CONTEMP. PROBS. 42 (1973).

75. 726 F.2d 1381 (9th Cir.), cert. denied, 469 U.S. 990 (1984).

76. *Id.* at 1383.

77. *Id.*

78. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

79. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d at 1392 (citations omitted).

[T]he critical question is whether the jury could have determined that Rule 4.3 reasonably served the NFL's interest in producing and promoting its

upheld the jury's conclusion that under the circumstances, the NFL Rule violated the Sherman Act because it caused significant harm to competition<sup>80</sup> and because its benefits could have been achieved by less restrictive means.<sup>81</sup>

While the status of territorial restraints on sports franchise movements has been the subject of considerable analysis in the legal literature,<sup>82</sup> these limitations have not been tested in subsequent litigation.<sup>83</sup> It seems appropriate, however, that they would continue to be tested under a rule of reason approach.<sup>84</sup>

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product, i.e., competing in the entertainment market, or whether Rule 4.3 harmed competition among the 28 teams to such an extent that any benefits to the League as a whole were outweighed.

*Id.* at 1394.

80. The court noted that:

Exclusive territories insulate each team from competition within the NFL market, in essence allowing them to set monopoly prices to the detriment of the consuming public. The rule also effectively foreclosed free competition among stadia such as the Los Angeles Coliseum that wish to secure NFL tenants.

*Id.* at 1395.

81. In response to the NFL's argument that Rule 4.3 was reasonable because it deterred team transfers, the court noted that "no standards or durational limits are incorporated into the voting requirement to make sure that concern is satisfied. Nor are factors such as fan loyalty and team rivalries necessarily considered." *Id.* at 1396. In addition, the court suggested that "[s]ome sort of procedural mechanism to ensure consideration of . . . factors [such as population, economic projections, facilities, and regional balance] may also be necessary, including an opportunity for the team proposing the move to present its case." *Id.* at 1397. For the subsequent opinion on the appropriate measure of damages, see *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987).

82. See generally articles cited *supra* note 62 and 73; Jeffrey Glick, *Professional Sports Franchise Movements and the Sherman Act: When and Where Teams Should be Able to Move*, 23 SANTA CLARA L. REV. 55 (1983); John A. Gray, *Section 1 of the Sherman Act and Control over NFL Franchise Locations: The Problem of Opportunistic Behavior*, 25 AM. BUS. L.J. 123 (1987); Lewis S. Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws: Los Angeles Memorial Coliseum Comm'n v. National Football League*, 15 CONN. L. REV. 183 (1983); Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV. 157 (1984); John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013; Richard Amoroso, Note, *Controlling Professional Sports Team Relocations: The Oakland Raiders' Antitrust Case and Beyond*, 17 RUTGERS L.J. 283 (1986); Charles Gray, Comment, *Keeping the Home Team at Home*, 74 CALIF. L. REV. 1329 (1986); Ronald J. Shingler, Note, *Antitrust Law and the Sports League Relocation Rules*, 18 GOLDEN GATE U. L. REV. 35 (1988); Mark A. Wesker, Comment, *Franchise Flight and the Forgotten Fan: An Analysis of the Application of Antitrust Laws to the Relocation of Professional Football Franchises*, 15 U. BALT. L. REV. 567 (1986); Daniel S. York, Note, *The Professional Sports Community Act: Congress' Best Response to Raiders?*, 38 HASTINGS L.J. 345 (1987).

83. See *National Basketball Ass'n v. SDC Basketball Club, Inc.*, 815 F.2d

5. Other Restrictions<sup>85</sup>

Professional sports leagues and organizations have also created and enforced a number of other rules and standards, which ostensibly are designed to preserve equality of on-field competition, to enhance fan interest and loyalty, and to maintain the integrity of the sport. Although these restrictions take a variety of forms, among the more common variety of restraints are limitations on player eligibility, standards for membership in organizations, and rules regarding equipment or venue. Many of these restraints have effects not only on players and team owners, but also on third parties.

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562, 567-68 (9th Cir.) (*Los Angeles Coliseum* did not establish criteria leagues must employ in evaluating franchisee's requests to move location; rule of reason governs league rules), *cert. dismissed*, 484 U.S. 960 (1987), *noted in*, Daniel B. Rubanowitz, Casenote, *Who Said "There's No Place Like Home?"*: *Franchise Relocation in Professional Sports*, 10 LOYOLA ENT. L. J. 163 (1990).

Similar restraints imposed by the National Hockey League on movements on franchises by its member teams were previously upheld in *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974). The court found that the League members were acting together in a common business enterprise, and that the League rule effected no restraint on competition in the relevant market—production of professional hockey in the United States and Canada. Curiously, in *Los Angeles Coliseum*, the Ninth Circuit noted its disagreement with this decision but did not overrule it, although it was decided by a trial court in the same circuit. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1390 n.4 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987).

84. The antitrust implications of a refusal to award a new franchise to an applicant, as opposed to the refusal to permit an existing franchisee to move its location, are raised by *Mid-South Grizzlies v. National Football League*, 720 F.2d 772 (3d Cir. 1983). *See supra* notes 25-30, 53-57 and accompanying text. *See also* *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 783 F.2d 1347, 1350 (9th Cir. 1986) (denial of franchise to city with minor league hockey team had no adverse effect on competition, since competition had not existed prior to refusal to award franchise); *cf.* *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) (refusal of sports arena owner to rent facility to eventually unsuccessful bidder for professional basketball franchise stated claims for denial of "essential facility" and group boycott).

85. *See generally* John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703 (1977); Dana M. Campbell, Note, *Antitrust Analysis in Professional Sports Management Cases: The Public Cries "Foul!"*, 25 ARIZ. L. REV. 995 (1983); A. Randall Farnsworth, Comment, *Herschel Walker v. National Football League: A Hypothetical Lawsuit Challenging the Propriety of the National Football League's Four-or-Five Year Rule Under the Sherman Act*, 9 PEPP. L. REV. 603 (1982); Karen A. Marencik, Note, *The National Football League Eligibility Rule and Antitrust Law: Illegal Procedure*, 19 VAL. U. L. REV. 729 (1985); Christian M. McBurney, Note, *The Legality of Sports Leagues' Restrictive Admissions Practices*, 60 N.Y.U. L. REV. 925 (1985); Robert B. Terry, Comment, *Application of Antitrust Laws to Professional Sports' Eligibility and Draft Rules*, 46 MO. L. REV. 797 (1981); Comment, *Antitrust: Preseason Football Tickets and Tie-ins*: *Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286 (2d Cir. 1974), 1975 WASH. U. L. Q. 495.

Courts have usually treated these restraints similarly to those on players and on team franchise locations discussed earlier. Because of a recognition that these restraints are necessary and often benefit competition, they are not rejected out of hand. Instead, courts have used a rule of reason approach, weighing the nature and purpose of the rule, its effect on competitors and on competition, and the existence of less restrictive alternatives to the approach adopted.<sup>86</sup>

Restrictions on player eligibility have been the most frequent source of antitrust challenge.<sup>87</sup> In some cases the courts have had little difficulty in rejecting the claim; two leading examples were banning from the sport a basketball player who bet on games involving the team for which he played,<sup>88</sup> and a rule excluding one-eyed hockey players, which was adopted for safety reasons.<sup>89</sup> Other rules, such as a requirement that professional golfers demonstrate certain skill levels as a condition of being allowed to continue to participate in national tournaments, have been upheld after judicial scrutiny.<sup>90</sup> On the other hand, certain other rules—for example, one barring professional bowlers from taking part in sanctioned tournaments if they participated in tournaments other than at a few approved locations, thereby excluding other facilities from organized

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86. *Cf. Cha-Car, Inc. v. Calder Race Course, Inc.*, 752 F.2d 609, 613, 615 n.15 (11th Cir. 1985) (policy of two race tracks assigning limited stall space in stables at race meets, evaluated under rule of reason; affirming jury's verdict of reasonableness). *But see* *Blalock v. Ladies Prof. Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973) (decision by golf association committee, made up of plaintiff's fellow golfers, to increase penalty for alleged cheating incident from fine and probation to one-year suspension from play, was group boycott which was unlawful per se).

87. *See generally* Mark F. Anderson, *Sherman Act and Professional Sports Associations' Use of Eligibility Rules*, 47 NEB. L. REV. 82 (1968); Robert H. Heidt, "Don't Talk of Fairness": *The Chicago School's Approach Toward Disciplining Professional Athletes*, 61 IND. L.J. 53 (1985); David G. Kabbes, *Professional Sports' Eligibility Rules: Too Many Players on the Field*, 1986 U. ILL. L. REV. 1233.

88. *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241, 243 (S.D.N.Y. 1961) ("rule . . . providing for the suspension of those who place wagers on games in which they are participating seems not only reasonable, but necessary for the survival of the league."). *See also* *Cokin v. American Contract Bridge League, Inc.*, 1983-1 Trade Cas. (CCH) ¶ 65,367 (S.D. Fla. 1981) (expulsion of members for violation of League rules was not per se unlawful group boycott; reasonableness inquiry required determination whether adequate procedural safeguards were accorded in disciplinary proceedings); *Manok v. Southeast Dist. Bowling Ass'n*, 306 F. Supp. 1215, 1219-21 (C.D. Cal. 1969) (suspension of bowler for participating in tournament under assumed name was lawful, absent showing of bad faith by association).

89. *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979).

90. *Dessen v. Professional Golfers' Ass'n of Am.*, 358 F.2d 165, 170-72 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966). *See also* *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 651-54 (5th Cir. 1977) (per se rule inapplicable to rules adopted by horse registration association, limiting registration rights to certain horses; under particular facts, refusal to register plaintiff's horse was reasonable).



bowling<sup>91</sup>—have been found unduly restrictive of competition without producing countervailing benefits, and therefore have been struck down as unreasonable.<sup>92</sup>

The legality of membership rules for the actual participants, or minimum standards for continued inclusion by entrepreneurs in an organization sponsoring or regulating a particular sport, also will turn on the purpose of the restrictions and their effect on competition. At one end of the spectrum, standards that do not exclude persons or groups on invidious grounds and that are then implemented fairly will normally withstand antitrust challenge.<sup>93</sup> At the other extreme, membership rules serving no substantial legitimate objective of the sport in question, while producing adverse competitive effects, will be struck down. A leading example of such an exclusionary rule was the NFL bylaw that prohibited any franchisee owner from also having an interest in a competing sports team.<sup>94</sup>

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91. *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371, 375-77 (9th Cir. 1966).

92. *See Medlin v. Professional Rodeo Cowboys Ass'n*, 1992-1 Trade Cas. (CCH) ¶ 69,787 (D. Colo. 1991) (rule prohibiting cowboys from participating in professional rodeo association's sanctioned championship finals if they competed in non-sanctioned rodeos enjoined as anticompetitive horizontal conspiracy); *see also* *Bowman v. National Football League*, 402 F. Supp. 754, 756 (D. Minn. 1975) (enjoining policy of football league preventing its member clubs from hiring individuals who had previously played for teams in defunct rival league); *cf.* *National Wrestling Alliance v. Myers*, 325 F.2d 768, 775 (8th Cir. 1963) (monopolization claim asserted against organization of wrestling promoters might state Sherman § 2 claim; verdict for plaintiff reversed for lack of evidence).

93. *See Brenner v. World Boxing Council*, 675 F.2d 445, 454-56 (2d Cir.) (suspension of boxing promoter from organization, resulting in his inability to continue promoting title fights, was subject to rule of reason analysis, and on facts was not unlawful group boycott), *cert. denied*, 459 U.S. 835 (1982); *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781, 787-90 (7th Cir. 1981) (harness racing association's prohibition on its members participating in races at non-association-member tracks tested by rule of reason; per se rule inappropriate for self-regulatory groups involved in organized sports); *Martin v. American Kennel Club, Inc.*, 697 F. Supp. 997, 1004-05 (N.D. Ill. 1988) (professional dog handler's suspension, for using abusive language at dog show, had no adverse impact on competition and was valid under rule of reason); *Cooney v. American Horse Shows Ass'n*, 495 F. Supp. 424, 431 (S.D.N.Y. 1980) (association's rule holding trainers responsible for presence of drugs in horses and permitting their suspension for violation of rule was tested under rule of reason); *Levin v. National Basketball Ass'n*, 385 F. Supp. 149, 152 (S.D.N.Y. 1974) (league members' vote refusing to allow sale of member club to plaintiffs had no anticompetitive effect and was not unreasonable, regardless of members' motivation). *See also* *United States v. United States Trotting Ass'n*, 1960 Trade Cas. (CCH) ¶ 69,761 (S.D. Ohio 1960) (harness racing association's regulations merely standardized rules of sport and promoted competition).

94. *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1260-61 (2d Cir.) (rule banning concurrent ownership by NFL team members of franchise in professional soccer league unreasonable; rule bars entry by most likely

Limitations on equipment or venue receive similar analysis. Since some standardization of equipment is frequently necessary to assure equality and fairness among on-field competitors, these restrictions will usually be upheld;<sup>95</sup> similarly, reasonable agreement on venue will also be found lawful.<sup>96</sup> However, limitations may be struck down if they are judged more restrictive than necessary to promote legitimate sporting goals, or if they appear principally designed to injure competitors of the members of the sports organization.<sup>97</sup>

## II. AMATEUR SPORTS<sup>98</sup>

Non-professional sports—principally those involving intercollegiate athletics and the Olympics and related events—are nonetheless

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group of entrants into competing sports organization), *cert. denied*, 459 U.S. 1074 (1982). See also *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1265 (N.D. Ga. 1973). See generally Allan Ashman, *Antitrust Law . . . Cross-Ownership Ban*, 68 A.B.A. J. 852 (1982); Drew D. Krause, Comment, *The National Football League's Ban on Corporate Ownership: Violating Antitrust to Preserve Traditional Ownership—Implications Arising From William H. Sullivan's Antitrust Suit*, 2 SETON HALL J. SPORT L. 175 (1992); David S. Moynihan, *Applying "Rule of Reason" Analysis Under the Sherman Act to Private Bans on Cross-Ownership*, 15 NEW ENG. L. REV. 697 (1980).

95. See, e.g., *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 980 (1st Cir. 1984) (rule adopted by several auto race tracks which limited drivers to a single manufacturer's tire for entire season was tested by rule of reason because it was "promulgated in a sports self-regulation context"; rule was not unlawful since it was adopted for reasonable purposes unrelated to intent to exclude competitors); *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*, 511 F. Supp. 1103, 1116-17 (D. Neb.) (rule prohibiting double-strung tennis rackets evaluated under rule of reason rather than per se rule; rule lawful because it was intended to further legitimate goals of preserving integrity of game), *aff'd per curiam*, 665 F.2d 222 (8th Cir. 1981); see also *Eureka Urethane, Inc. v. PBA, Inc.*, 746 F. Supp. 915, 932-33 (E.D. Mo. 1990) (bowlers' association's enforcement of rules, requiring prior approval of balls and limiting balls bearing commercial logos, was neither group boycott of ball manufacturer, nor price fixing respecting commercials for televised tournaments), *aff'd*, 935 F.2d 990 (8th Cir. 1991); *STP Corp. v. United States Auto Club, Inc.*, 286 F. Supp. 146, 171 (S.D. Ind. 1968) (change in specifications of turbine engines used in race cars was reasonably designed to enhance competition).

96. See *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 821-22 (9th Cir.) (agreement between two horse-racing track operators, sharing a single facility, as to allocation of dates in racing season, was not per se unlawful territorial division or temporal allocation agreement), *cert. denied*, 456 U.S. 1011 (1982).

97. See *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 560 F. Supp. 591, 602-04 (D. Mass. 1983) (rule adopted by auto race tracks, in conjunction with tire manufacturer, prohibiting use of more than one brand of tire within specified price range at tracks, unduly limited competition from other tire manufacturers and was unreasonable per se), *rev'd*, 733 F.2d 973 (1st Cir. 1984).

98. See generally Steven H. Burkow & Fred L. Slaughter, *Should Amateur Athletes Resist the Draft?*, 7 BLACK L.J. 314 (1981); Wendy T. Kirby & T. Clark

still "big business," involving expenditures and revenues running to the billions of dollars. Although the teams and their participants are not necessarily actuated by profit motives, their activities can have important effects in a variety of markets, in which the promotion or preservation of competition is a significant concern. Therefore, these activities may raise antitrust issues, and the question of potential antitrust immunity will surface.

### A. *Intercollegiate Athletics*<sup>99</sup>

Virtually all major institutions which participate in intercollegiate athletics are members of or affiliated with the National Collegiate Athletic Association (NCAA).<sup>100</sup> Although both independent acts of individual colleges, and independent agreements between schools or athletic conferences, might raise antitrust concerns, the majority of antitrust disputes are the result of adherence to NCAA rules, which may impact adversely on competition.

The most significant antitrust challenges to collegiate sports activities have arisen in two broad arenas: off-the-field activities, particularly involving broadcasting rights; and game-related rulemaking,

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Weymouth, *Antitrust and Amateur Sports: The Role of Noneconomic Values*, 61 IND. L.J. 31 (1985); James V. Koch, *The Economic Realities of Amateur Sports Organizations*, 61 IND. L.J. 9 (1985); Donald L. Shuk, Jr., Note, *Administration of Amateur Athletics: The Time for an Amateur Athlete's Bill of Rights has Arrived*, 48 FORDHAM L. REV. 53 (1979).

99. See generally Arthur D. Austin, *The Legality of Ticket Tie-Ins in Intercollegiate Athletics*, 15 U. RICH. L. REV. 1 (1980); Lee Goldman, *Sports and Antitrust: Should College Students be Paid to Play?*, 65 NOTRE DAME L. REV. 206 (1990) [hereinafter Goldman]; Deborah E. Klein and William B. Briggs, *Proposition 48 and the Business of Intercollegiate Athletics: Potential Antitrust Ramifications under the Sherman Act*, 67 DENV. U. L. REV. 301 (1990); Richard B. McKenzie & E. Thomas Sullivan, *Does the NCAA Exploit College Athletes? An Economic and Legal Reinterpretation*, 32 ANTITRUST BULL. 373 (1987); Sharon E. Rush, *Touch-downs, Toddlers, and Taboos: On Paying College Athletes and Surrogate Contract Mothers*, 31 ARIZ. L. REV. 549 (1989); John C. Weistart, *Antitrust Issues in the Regulation of College Sports*, 5 J.C. & U.L. 77 (1978); Kelly W. Bhirdo, Linda A. Haviland & Thomas J. Warth, Comment, *McCormack v. National Collegiate Athletic Association: College Athletics Sanctions from an Antitrust and Civil Rights Perspective*, 15 J.C. & U.L. 459 (1989); Note, *National Collegiate Athletic Association's Certification Requirement: A Section 1 Violation of the Sherman Antitrust Act*, 9 VAL. U. L. REV. 193 (1974); Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655 (1978).

100. See generally Goldman, *supra* note 99, at 209-12; Terrill L. Johnson, *The Antitrust Implications of the Divisional Structure of the National Collegiate Athletic Association*, 8 U. MIAMI ENT. & SPORTS L. REV. 97 (1991) (questioning under the antitrust laws the structuring of the NCAA's giving Division I teams significant economic advantage); James C. Koch, *A Troubled Cartel: The NCAA*, 38 LAW & CONTEMP. PROBS. 135 (1973) (examining the problems of the NCAA as a business cartel and advocating the need for restructuring).

particularly focusing on player eligibility standards.<sup>101</sup> While most courts have not accorded a general immunity to the NCAA or its members regarding these activities, the decisions also recognize that somewhat different standards may be appropriate for evaluating their legality.

The leading case in the area of intercollegiate athletics, arising from a dispute involving broadcasting rights, is *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*.<sup>102</sup> For several decades, the NCAA had implemented various plans for the sale of rights for the television broadcasting of live college football games. These plans placed limits both on the total number of televised games and on the number of games that any one college could televise. NCAA members were prohibited from selling television rights other than in accordance with the plans. Several universities brought suit challenging these NCAA restrictions, asserting that they resulted in price fixing and group boycotts in violation of the Sherman Act.

The NCAA offered two justifications for its television policies: they protected against the loss of live attendance at games, which might otherwise occur if there were unlimited televised games, and they tended to preserve competitive balance among the football programs of the NCAA member schools.<sup>103</sup> Although the United States Supreme Court declined to apply a *per se* rule to these policies, the Court ultimately rejected these proffered defenses and concluded that the NCAA regulations violated the antitrust laws.

Justice Stevens' opinion for the Court recognized that different standards—involving Rule of Reason analysis rather than *per se* treatment—were appropriate for evaluating these activities. As the Court went to pains to assert, the reason for this different treatment was neither the uniqueness of this conduct nor the special qualities of the defendants. Rather, the particular nature of the “industry”—intercollegiate sports—required recognition that some restraints of trade were necessary for effective competition to prevail.<sup>104</sup> However, here the restraints imposed on the NCAA member institutions were

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101. “[I]t is clear that the NCAA is now engaged in two distinct kinds of rulemaking activity. One type . . . is rooted in the NCAA’s concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose.” *Justice v. NCAA*, 577 F. Supp. 356, 383 (D. Ariz. 1983).

102. 468 U.S. 85 (1984).

103. *Id.* at 96.

104. [W]e have decided that it would be inappropriate to apply a *per se* rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA’s historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal

unreasonable; the restraints injured consumers by limiting output, reduced competition far more than necessary, and were inappropriate (and in part also unsuccessful) for achieving their asserted benefits.<sup>105</sup>

The other frequent subject of antitrust litigation—player eligibility or other similar rules—falls into two general categories: rules designed to preserve some measure of equality among collegiate athletic programs, and rules intended to preserve ideals of amateurism. Examples of the former are rules limiting the number of assistant coaches that may be employed by a member institution in a particular sport.<sup>106</sup>

restraints on competition are essential if the product is to be available at all.

*Id.* at 100-01 (footnotes omitted).

105. *Id.* at 101. *Cf.* *Regents of Univ. of Cal. v. ABC, Inc.*, 747 F.2d 511, 516-19 (9th Cir. 1984) (refusal by two universities, which had entered into exclusive contract with one television network, to allow broadcasting by another network, of their football games against schools not a party to that contract, was unlawful concerted refusal to deal); *Association of Indep. Television Stations, Inc. v. College Football Ass'n*, 637 F. Supp. 1289 (W.D. Okla. 1986) (legality of agreements between certain football conferences and teams, and certain broadcasters, tested under rule of reason; summary judgment inappropriate).

See generally David Greenspan, *College Football's Biggest Fumble: The Economic Impact of the Supreme Court's Decision in NCAA*, 33 ANTITRUST BULL. 1 (1987); Bryon L. Gregory & J. Craig Busey, *Alternative Broadcasting Arrangements After NCAA*, 61 IND. L.J. 65 (1985); Eugene D. Gulland, J. Peter Byrne & Sheldon E. Steinbach, *Intercollegiate Athletics and Television Contracts: Beyond Economic Justifications in Antitrust Analysis of Agreements Among Colleges*, 52 FORDHAM L. REV. 717 (1984); James F. Ponsoldt, *The Unreasonableness of Coerced Cooperation: A Comment Upon the NCAA Decision's Rejection of the Chicago School*, 31 ANTITRUST BULL. 1003 (1986); Peter W. Bellas, Note, *NCAA v. Board of Regents: Supreme Court Intercepts Per Se Rule and Rule of Reason*, 39 U. MIAMI L. REV. 529 (1985); Robert L. Jackstadt, Note, *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association: Antitrust Violations in College Football*, 29 ST. LOUIS U. L.J. 207 (1984); Robert J. Kirby, Note, *Antitrust Law—NCAA Thrown for a Loss by Courts' Traditional Antitrust Blitz—NCAA v. Board of Regents of the University of Oklahoma*, 104 S. Ct. 2948 (1984), 18 CREIGHTON L. REV. 917 (1985); Christine O'Connor, Note, *Final Score: Board of Regents 3, NCAA 0—Supreme Court Affirms Tenth Circuit's Finding that NCAA Television Plan Constituted Restraint of Trade*, 62 DENV. U. L. REV. 377 (1985); Robert M. Pfeifer, Comment, *Board of Regents of University of Oklahoma v. National Collegiate Athletic Association, Application of the Per-Se Rule to Price-Fixing Arrangements*, 18 U. RICH. L. REV. 185 (1983); Suzanne E. Rand, Note, *The Commercialization of College Football: The Universities of Oklahoma and Georgia Learn an Antitrust Lesson in NCAA v. Board of Regents*, 12 PEPP. L. REV. 515 (1985); Johnathan F. Seib, Note, *Antitrust and Nonmarket Goods: The Supreme Court Fumbles Again—National Collegiate Athletic Association v. Board of Regents*, 104 S. Ct. 2948 (1984), 60 WASH. L. REV. 721 (1985); William J. Sims, Note, *NCAA v. Board of Regents, A Truncated Rule of Reason: Retaining Flexibility Without Sacrificing Efficiency*, 27 ARIZ. L. REV. 193 (1985); Major Bashinsky, Recent Decision, *Hennessey & Hodson v. NCAA*, No. 76-P-0799-W (N.D. Ala. Sept. 27, 1976), 7 CUMB. L. REV. 505 (1977); Eric D. Daniels, Casenote, *Did the Supreme Court Fumble? The Supreme Court's Failure to Endorse a Market Power Threshold to the Application of the Rule of Reason for Cases Under Section 1 of the Sherman Act in NCAA v. Board of Regents*, 27 B.C. L. REV. 579 (1986).

106. See, e.g., *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136,

Examples of the latter are limitations on the financial benefits that may be given to student-athletes,<sup>107</sup> prohibitions on continuing to play college-level football after a player submits his name for the professional draft,<sup>108</sup> or a ban on playing college hockey if the player received compensation for playing the sport prior to enrollment in college.<sup>109</sup>

Since the adoption of these kinds of limitations does not reflect the same economic motivation as those directed to broadcasting rights, and thus is less likely to diminish competition, some courts have held eligibility rules to be beyond the ambit of the antitrust laws.<sup>110</sup> The majority of decisions, however, have held that these restrictions are also subject to antitrust scrutiny, although usually with a greater receptivity to the defendants' arguments of justification or absence of actual injury to competition.<sup>111</sup>

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1147-54 (5th Cir. 1977). *See also* Weiss v. Eastern College Athletic Conference, 563 F. Supp. 192 (E.D. Pa. 1983) (athlete not entitled to preliminary injunction against rule denying eligibility for period of one year to student who transfers from one school to another; no showing of antitrust violation); Kupec v. Atlantic Coast Conference, 399 F. Supp. 1377 (M.D. N.C. 1975) (player not entitled to preliminary injunction; unlikely that rule, denying further eligibility to person participating in football during four different seasons, violated antitrust laws).

107. *See, e.g.,* McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1988); United States v. Walters, 711 F. Supp. 1435, 1441-42 (N.D. Ill. 1989); Justice v. National Collegiate Athletic Ass'n, 577 F. Supp. 356 (D. Ariz. 1983). *See also* College Athletic Placement Serv., Inc. v. National Collegiate Athletic Ass'n, 1975-1 Trade Cas. (CCH) ¶ 60,117 (D.N.J.) (Sherman Act does not affect NCAA rule denying eligibility to students paying fees to agency for assistance in obtaining athletic scholarships), *aff'd without opinion*, 506 F.2d 1050 (3d Cir. 1974). *See generally* Leonard M. Shulman, Note, *Compensation for Collegiate Athletes: A Run for More Than the Roses*, 22 SAN DIEGO L. REV. 701 (1985).

108. Gaines v. National Collegiate Athletic Ass'n, 746 F. Supp. 738 (M.D. Tenn. 1990); Banks v. National Collegiate Athletic Ass'n, 746 F. Supp. 850 (N.D. Ind. 1990), *aff'd*, 977 F.2d 1081 (7th Cir. 1992). *Cf.* Shelton v. National Collegiate Athletic Ass'n, 539 F.2d 1197 (9th Cir. 1976) (NCAA rule, rendering basketball player who signed professional contract ineligible for continued participation in intercollegiate athletics, survives equal protections clause challenge). *See generally* Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299 (1992).

109. Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295 (D. Mass. 1975).

110. Gaines v. National Collegiate Athletic Ass'n, 746 F. Supp. 738, 742-45 (M.D. Tenn. 1990); Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 303-04 (D. Mass. 1975).

111. Banks v. National Collegiate Athletic Ass'n, 746 F. Supp. 850, 856-57 (N.D. Ind. 1990) (restraints lawful under Rule of Reason), *aff'd*, 977 F.2d 1081 (7th Cir. 1992); Justice v. National Collegiate Athletic Ass'n, 577 F. Supp. 356, 375-83 (D. Ariz. 1983) (restraints were reasonable); Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136, 1148-49 (5th Cir. 1977) (same); College Athletic Placement Serv., Inc. v. National Collegiate Athletic Ass'n, 1975-1 Trade Cas. (CCH) ¶ 60,117 (D.N.J.) (same), *aff'd without opinion*, 506 F.2d 1050 (3d Cir. 1974). *See also* McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338,

*B. Non-Scholastic Amateur Sports*<sup>112</sup>

The most important amateur sporting events, outside of the setting of college or high school sports, are the quadrennial Olympic Games, the Pan-American games, and various qualifying events leading up to these events.<sup>113</sup> A few other sports—of which golf,<sup>114</sup> tennis<sup>115</sup> and hockey<sup>116</sup> are the most prominent examples<sup>117</sup>—also have some significant level of involvement by non-professionals. However, it is in the setting of Olympic-type sports that antitrust disputes have most frequently arisen.

The bodies which are responsible for supervising and controlling amateur sports share many of the same concerns as the organizations that regulate professional sports. The subjects of regulation include eligibility for participation, uniformity of rules and equipment, and

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1343-45 (5th Cir. 1988) (“[a]ssuming, without deciding, that the antitrust laws apply to the eligibility rules”; restraints were reasonable). *Cf.* Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Ass’n, 735 F.2d 577 (D.C. Cir. 1984) (NCAA decision to expand activities and regulations to include women’s sports, which drove women’s intercollegiate sports organization out of business, not entitled to antitrust immunity; however, lawful under reasonableness analysis); Samara v. NCAA, 1973-1 Trade Cas. (CCH) ¶ 74,536 (E.D. Va. 1973) (mere threat of denial of eligibility to athletes contemplating participation in uncertified track meet not actionable; economic injury was merely speculative).

112. See generally Allan C. Bradshaw, *Antitrust Policy and Olympic Athletes: The United States Ski Team Goes for the Gold*, 1985 UTAH L. REV. 831.

113. In fact, professional athletes are now permitted to participate in some Olympic events. For example, in 1992, professional basketball players comprised virtually the entire American team.

114. See Weight-Rite Golf Corp. v. United States Golf Ass’n, 766 F. Supp. 1104 (M.D. Fla. 1991) (determination by organization that shoes failed to comply with Rules of Golf was justified by objective of insuring “that a player’s score is the product of his skill, rather than his equipment”), *aff’d*, 953 F.2d 651 (11th Cir. 1992).

115. See Gunter Harz Sports, Inc. v. United States Tennis Ass’n, 511 F. Supp. 1103 (D. Neb.) (rule prohibiting double-strung tennis rackets evaluated under rule of reason rather than per se rule; rule lawful, because it was intended to further legitimate goals of preserving integrity of game), *aff’d per curiam*, 665 F.2d 222 (8th Cir. 1981).

116. See Tondas v. Amateur Hockey Ass’n of U.S., 438 F. Supp. 310 (W.D. N.Y. 1977) (amateur hockey association’s refusal to allow hockey team to compete in particular league or to play games in certain location may have been motivated by financial considerations; legality tested by rule of reason).

117. See also Bridge Corp. of Am. v. American Contract Bridge League, 428 F.2d 1365 (9th Cir. 1970) (refusal of bridge organization to sanction tournament if plaintiff’s portable computer system was used for scoring was neither per se unlawful group boycott, nor was it unreasonable because of anticompetitive motive to eliminate or damage plaintiff), *cert. denied*, 401 U.S. 940 (1971). *Cf.* Amateur Softball Ass’n of Am. v. United States, 467 F.2d 312 (10th Cir. 1972) (absolute exemption for professional baseball does not extend to amateur baseball).

location of events.<sup>118</sup> Because of the perceived need for self-regulation and cooperation, as well as the diminished likelihood of a significant adverse effect on competition from restraints involving amateur sports, here too, courts have used the rule of reason as the appropriate standard for evaluating the legality of these restraints.<sup>119</sup>

Control and supervision of the Olympic Games has been vested initially in the International Olympic Committee (IOC). Each nation must be represented by a national Olympic committee that is recognized by the IOC, and the national committees in turn recognize a national governing body (NGB) for each Olympic sport.<sup>120</sup> In this country, the United States Olympic Committee (USOC)—which is a private corporation established pursuant to federal statute<sup>121</sup>—has been recognized by the IOC as the American national Olympic committee. In 1978, because of a substantial level of disorganization and in-fighting, Congress passed the Amateur Sports Act<sup>122</sup> to regularize this structure. The system created by this statute presumes that there will be monolithic control by a recognized NGB for each amateur sport, and the statute delegates substantial regulatory authority to the USOC and to each NGB.

The antitrust status of this system was examined by the United States Court of Appeals for the Tenth Circuit in *Behagen v. Amateur Basketball Association of the United States*.<sup>123</sup> Pursuant to the rules of the Federation Internationale de Basketball Amateur (FIBA)—the international organization that governs amateur basketball—a player seeking to play in a foreign country is required to obtain a travel permit from his home country's NGB and a FIBA license. In *Behagen*, the plaintiff, an American, had entered into a contract to play in an "amateur" basketball league in Italy. Because the plaintiff had previously played professional basketball, the American NGB informed FIBA that he was ineligible to play amateur sports; FIBA in turn notified the Italian team of this fact, which then refused to honor its contract with the plaintiff. In an action against FIBA and

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118. See *supra* notes 85-97.

119. See, e.g., *Brant v. United States Polo Ass'n*, 631 F. Supp. 71 (S.D. Fla. 1986) (polo player's suspension, resulting in his inability to compete in future sanctioned match, because of verbal abuse and physical threats to umpire, was reasonable). See also *Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n*, 617 F. Supp. 1058, 1061 (S.D.N.Y. 1985) (equestrian federation's rule, limiting time and place of holding various categories of recognized horse shows, evaluated under rule of reason; in absence of injury, owner-operator of unapproved horse shows lacked standing to challenge rule).

120. *Behagen v. Amateur Basketball Ass'n*, 884 F.2d 524, 527 (10th Cir. 1988), *cert. denied*, 495 U.S. 918 (1990).

121. 36 U.S.C. §§ 371-384 (1982).

122. Pub. L. No. 95-606, 92 Stat. 3045 (codified at 36 U.S.C. §§ 371-396 (1982)).

123. 884 F.2d 524 (10th Cir. 1988), *cert. denied*, 495 U.S. 918 (1990).



the American NGB, asserting that the defendants' conduct constituted an illegal group boycott, the Tenth Circuit held that this conduct was impliedly immunized from antitrust scrutiny by the Amateur Sports Act of 1978.<sup>124</sup>

The statute's express provision for a single NGB in each sport resulted in extending a high degree of control over that sport to the NGB. Since that degree of control over amateur basketball resulted in precisely the kind of antitrust violation of which the plaintiff complained, and since the defendants' actions here were "necessary to implement the clear intent of Congress," the Tenth Circuit found an implied exemption from the antitrust laws for this conduct.<sup>125</sup>

#### CONCLUSION

Sports—be they professional or amateur—involve competition both on and off the field. While regulation and agreement with respect to the on-field competition are both necessary and inevitable, the appropriate scope of limitations on the off-field aspects of sports is less obvious. Attempts to constrain this latter form of competition will frequently raise issues under the antitrust laws. The accommodation of these interests requires sensitivity to the goals and values implicit in both of these important areas.

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124. 884 F.2d at 527-30.

125. *Id.*